In The

Supreme Court of the United States

October Term, 1976

No. 76-366

PHILIP REINHARD, etc., et al.,

Defendants-Appellants,

vs.

EAGLE BOOKS, INC., etc., et al.,

Plaintiffs-Appellees.

On Appeal From a 3-Judge United States District Court,
Northern District of Illinois, Western Division

MOTION TO DISMISS OR AFFIRM

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Appellees move to dismiss or affirm the judgment of the District Court, pursuant to Rule 16 (1)(b) and (1)(c) of the Rules of this Court.

STATEMENT

This case involves an appeal from the issuance of a declaratory judgment and permanent injunction concerning prospective enforcement of the Illinois Obscenity Statute, Chapter 38, § 11-20, Illinois Revised Statutes (1975), entered on May 28, 1976. In the court below, plaintiff Eagle Books, Inc., and eight individual plaintiffs, sued Philip Reinhard, State's Attorney of Winnebago County, Illinois, and Delbert Peterson, Chief of Police, Rockford, Illinois. The three-judge District Court held the said obscenity statute unconstitutional, and judged the facts of the case to be appropriate to fashion injunctive relief on behalf of the corporate plaintiff Eagle Books, Inc.

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OPINION BELOW

The opinion of the three-judge District Court for the Northern District of Illinois, Western Division, in *Eagle Books, Inc., et al. v. Reinhard, et al.*, — F. Supp. — (No. 76-C-20014), is attached to appellants' jurisdictional statement as an appendix.

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ARGUMENT

The facts in this case, as demonstrated by the jurisdictional statement of the appellants, the record and the opinion of the three-judge district court disclose the following:

1. Eagle Books, Inc. owns two bookstores in the City of Rockford. In late February and early March of 1976, these two bookstores were subjected to a series of raids in which employees were arrested and search warrants executed, resulting in the seizure of films, monies, equipment, personal property, movie projectors, and other items. These seizures exceeded the authority of the issued search warrants, which were limited to the seizure of specific, named reels of motion picture film.

2. During the course of the raids and seizures, the stores ceased doing business, and materials available for distribution were cut off.

The stores in question have available for purchase and distribution to the public material that is not obscene, without question protected by the First Amendment to the Constitution of the United States. Contrary to the assertion of the jurisdictional statement of the appellants, Eagle Books, Inc. has never admitted nor asserted that the materials seized were obscene, and rather has contended that the significant aspect about the material available for sale or distribution is the admission by the defendants-appellants that non-obscene, First Amendment-protected material was made available to the public at the respective locations. The distribution of this protected communicative material to the public was prevented by the arrests, searches and seizures conducted by defendants and their agents.

3. As a result of the conduct of the defendants, First Amendment rights of Eagle Books, Inc. and persons similarly situated, interested in the distribution of material protected by the First Amendment, have been chilled and

otherwise interrupted. Eagle Books, Inc. has lost substantial revenue as a result of the conduct of the defendants, much of which cannot be calculated. Access to communicative materials by citizens in the Winnebago County area has been likewise undermined.

4. The individual employees of Eagle Books, Inc., who were plaintiffs in the District Court below, do not occupy the identical position as the corporate plaintiff for purposes of determining the irreparable injury that has resulted from the searches, seizures and prosecutions commenced and conducted by the defendants.

5. The State of Illinois, through its supreme judicial court, has had four opportunities to construe the Illinois Obscenity Statute, Chapter 38, § 11-20 (1975), since the decision in *Miller v. California,* 413 U. S. 15 (1973). *People v. Ridens,* 59 Ill. 2d 362, 321 N. E. 2d 264 (1974) (hereinafter referred to as *Ridens II*); *People v. Gould,* 60 Ill. 2d 159, 324 N. E. 2d 412 (1975); *People v. Hume, Inc.,* 60 Ill. 2d 397, 327 N. E. 2d 412 (1975); *People v. Ward,* 63 Ill. 2d 437, 349 N. E. 2d 47 (1976), app. pending, 43 L. W. 3202.

6. A review of this case history in the Illinois Supreme Court aptly demonstrates that the *Miller*-mandated specificity has not been judicially construed into the Illinois Obscenity Statute. Appellants have contended that the opinion in *People v. Gould,* 60 Ill. 2d 159, 324 N. E. 2d 412 (1975), demonstrates the intent of the Illinois Supreme Court to adopt the *Miller* examples of the specific types of sexual conduct, the depiction of which, is made a crime under the Illinois Obscenity Statute. The opinion in *People v. Ward,* 63 Ill. 2d 437, 349 N. E. 2d 47 (1976), itself an-

swers the assertion of the appellants in the negative. *People v. Ward* expressly refers to the opinion in *Ridens II,* and expressly rejects the contention that the Illinois Obscenity Statute must be provided with the necessary specificity. *People v. Ward,* 63 Ill. 2d 437, 440, 441, 349 N. E. 2d 47, 48, 49 (1976), app. pending, 43 L. W. 3202.

7. Cases of this Court are predominate authority for the proposition that the federal, three-judge district court was entirely correct in its analysis of the federal-state comity considerations in this case. Those considerations include whether or not the plaintiff, who is afforded injunctive and declaratory relief, has any pending state proceedings against it, *Doran v. Salem Inn, Inc.,* 422 U. S. 922 (1975); whether or not the same plaintiff has been made a party to a state criminal proceeding, *Hicks v. Miranda,* 420 U. S. 920 (1975); whether or not a statute on its face is patently unconstitutional, *Huffman v. Pursue, Ltd.,* 420 U. S. 592 (1975); and finally, whether or not substantial and unjustifiable irreparable injury flows from the consequence of state official action, injuring First Amendment freedoms that can be redressed only by declaratory and prospective injunctive relief, *Steffel v. Thompson,* 415 U. S. 452 (1974).

8. In the case at bar, the federal district court made specific findings concerning the fact that Eagle Books, Inc. had no pending state proceedings against it. Eagle Books, Inc., the federal district court found, had suffered and would suffer substantial irreparable injury as a result of the multiple prosecutions, searches and seizures against its premises and against its employees. Eagle Books, Inc. had no adequate remedy, and in fact, no meaningful op-

portunity at all, to raise its constitutional attack against the Illinois Obscenity Statute in the state courts of Illinois because the Illinois Supreme Court, after four opportunities to do so, had failed to meet the specificity requirements of *Miller v. California* in a proper fashion. Further, by giving prospective injunctive and declaratory relief to Eagle Books, Inc., the federal court in no manner interfered with pending state criminal proceedings against the individual plaintiffs, thus mitigating any federal-state conflicts within the meaning of *Younger v. Harris,* 401 U. S. 37 (1971). Finally, because First Amendment interests are at issue in this type of lawsuit, Eagle Books, Inc. and all those similarly situated feels the effects of the patently unconstitutional Illinois Obscenity Statute. This unconstitutional statute does not have its patent invalidity encrusted upon every provision, but certainly represents legislation whose offensiveness to Due Process considerations under the Constitution of the United States is more than substantial.

9. After making the aforementioned findings and dealing with the aforementioned considerations, the federal three-judge court provided prospective injunctive and declaratory relief on behalf of the corporate plaintiff Eagle Books, Inc. No relief whatsoever was fashioned for the individual plaintiffs, who were left to assert their positions in state criminal proceedings. The appellants have contended that the decision of the federal three-judge court has somehow prevented them from fulfilling the duties of their respective offices. On the contrary, it is certainly asserted that the defendants-appellants' position is that they should have the power to enforce and prosecute under an unconstitutional statute. The minute, detailed analysis and logic of the three-judge court authoritatively defeats the arguments of the appellants in this case. In a case where First Amendment interests and overzealous prosecutorial conduct has been shown, certainly extraordinary circumstances, justifying federal injunctive and declaratory relief, are present. *Zwicker v. Koota,* 389 U. S. 241 (1967); *Dombrowski v. Pfister,* 380 U. S. 479 (1965); *Younger v. Harris,* 401 U. S. 37 (1971); *Hicks v. Miranda,* 420 U. S. 920 (1975); *Samuels v. Mackell,* 401 U. S. 764 (1971). After such analysis, on the merits, the federal three-judge court correctly held the Illinois Obscenity Statute unconstitutional and fashioned declaratory and injunctive relief solely for the corporate plaintiff Eagle Books, Inc.

CONCLUSION

For the foregoing reasons, the Court should dismiss the appeal in this case or affirm the judgment of the District Court.

Respectfully submitted,

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